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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-924

SAVE OUR INVALUABLE LAND (SOIL), INC., et al.,
Petitioners,

vs.

COLONEL WILLIAM R. NEEDHAM, et al.,
Respondents,

and

CITY OF OLATHE, KANSAS, et al.,
Intervenor-Respondents.

BRIEF OF CITY OF OLATHE, KANSAS, ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Calvert Cliffs' Coordinating Committee v. *Atomic Energy Comm.*, 449 F.2d 1109 (D.C.Cir. 1971), cert. den. 404 U.S. 942 (1972) 6, 9, 10

Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 3, 5

Conservation Council v. *Froehlke*, 473 F.2d 664 (C.A.-4, 1973) 5, 6, 8

Environmental Defense Fund, Inc. v. *Corps of Engineers*, 492 F.2d 1123 (C.A.-5, 1974) 5, 7

Environmental Defense Fund, Inc. v. *Froehlke*, 473 F.2d 346 (C.A.-8, 1972) 6, 9

Environmental Defense Fund, Inc. v. *Tennessee Valley Authority*, 371 F.S. 1004, aff'd 492 F.2d 497 (C.A.-6, 1974) 6, 8

Jicarilla Apache Tribe of Indians v. *Morton*, 471 F.2d 1275 (C.A.-9, 1973) 5

National Helium Corp. v. *Morton*, 486 F.2d 995 (C.A.-10, 1973), cert. den. 416 U.S. 993 (1973) 3, 10

Sierra Club v. *Froehlke*, 486 F.2d 946 (C.A.-7, 1973) 6, 8

Sierra Club v. *Stamm*, 507 F.2d 788 (1974) 5

Silva v. *Lynn*, 482 F.2d 1282 (C.A.-1, 1973) 5, 6

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The only ground invoked for issuance of a writ of certiorari is an asserted conflict of the opinion of the Court of Appeals for the Tenth Circuit in the instant case with the decisions of other courts of appeal, on the scope of judicial review of an Environmental Impact Statement under the National Environmental Policy Act.

The other "Questions Presented" simply challenge the correctness of the judgment of the court below. They will not be further noticed here, other than to observe that they are questions which were completely tried and decided in the trial court, with that judgment affirmed, after having been fully briefed and argued in the Court of Appeals.

The asserted conflict between the courts of appeal is more fancied than real. To illustrate that, pertinent language from the opinion of the Court in the instant case and the cases which it follows will be set out verbatim, followed by similar extracts from the opinions of the courts which allegedly follow a different rule.

The opinion of the Court of Appeals for the Tenth Circuit in the instant case is now reported in the advance sheets, 542 F.2d 539. The pronouncement on the scope of review of the Environmental Impact Statement is succinct, at l.c. 542-3:

> "Judicial review of an EIS is limited to a consideration of the following: (1) does the EIS discuss all of the five procedural requirements listed in 42 U.S.C. § 4332(C); (2) does the EIS constitute a good faith compliance with the demands of NEPA; and (3) does the statement contain a reasonable discussion of the subject matter involved in the five respective areas? *Sierra Club* v. *Stamm*, 507 F.2d 788 (10th Cir. 1974) and *National Helium Corporation* v. *Morton*, 486 F.2d 995 (10th Cir. 1973), cert. denied, 416 U.S. 993, 94 S.Ct. 2405, 40 L.Ed.2d 772 (1973). Thus, in a real sense, an EIS is to be tested by the concepts of 'good faith' and a 'reasonable' discussion of the five mandated areas of subject matter. Perfection is not the test. *Environmental Defense Fund* v. *Corps of Engineers of the United States Army*, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1972). Nor should the courts in evaluating an EIS engage in hindsight judgment by way of second guessing."

The Court of Appeals for the Tenth Circuit first cites two of its own earlier decided cases, one of which had been denied certiorari by this court.

In the earlier of the two cases, *National Helium Corp.* v. *Morton*, 486 F.2d 995 (C.A.-10, 1973), cert. den. 416 U.S. 993 (1973), the court, Doyle, Circuit Judge, writing, first distinguished *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), on the ground that it involved a review of agency action, i.e. the decision of the Secretary of Transportation in respect to the building of a highway through a park, and not the review of environmental impact statement at all. The court then laid down the rule it distilled from what it deemed to be the better reasoned decisions. Because what the court said there lays out so well the scope of review in the Court of Appeals for the Tenth Circuit, as well as the reasoning which underlies it, the words of the Court are quoted fully. At 1001-2:

> "The better reasoned decisions have required an objective good faith effort to comply with the statutory procedural requirements. Other than that, the courts have demanded that the agency do more than mechanically pursue the procedural standards. Thus, in *Calvert Cliffs' Coord. Com.* v. *United States A. E. Com'n*, 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971), the court added to the good faith standard by saying that the agency must comply with the procedural requirements to the fullest extent possible. The same Circuit in *Natural Resources Defense Council, Inc.* v. *Morton*, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972), has said that the procedural requirements are not intended to be a straitjacket or to demand what is, fairly speaking, not meaningfully possible.
>
> "Finally, the most recent decision of the D. C. Circuit, *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, D.C.Cir., 481 F.2d 1079, 1973 (sic), expounds the standards more clearly than earlier decisions:

It is apparent, however, that the Commission seeks to avoid issuing its forthcoming 'environmental survey' as an impact statement under Section 102, not out of any desire to circumvent NEPA's procedural requirements, but rather because of a fear that Section 102's requirements as to the contents of an impact statement are so strict, particularly as to the need for 'detail' in the statement, that any Commission attempt to issue its environmental survey as a NEPA statement would be doomed to failure. While we do not altogether understand the Commission's fears, we feel they are based on certain misapprehensions as to what NEPA requires.

* * *

Accordingly, if the Commission's environmental survey is prepared and issued in accordance with NEPA procedures, and if the Commission makes a good faith effort in the survey to describe the reasonably foreseeable environmental impact of the program, alternatives to the program and their reasonably foreseeable environmental impact, and the irreversible and irretrievable commitment of resources the program involves, we see no reason why the survey will not fully satisfy the requirements of Section 102(C).

"The environmental impact statement should be placed in perspective. The relevant provisions bring environmental factors into the agency decision-making placing them on an equal footing with economic, technical and other considerations. Also, this environmental impact statement serves as source material for the head of the agency, the Congress, the President and the public. See *Calvert Cliffs'*, supra. If the

agency had failed altogether to follow out the procedure required by NEPA, the arbitary and capricious standard might well apply. That is not our present problem. The rule of reason is a more appropriate standard where the sufficiency of the statement is being tested."

The later of the two cases followed, *Sierra Club* v. *Stamm*, 507 F.2d 788 (1974) follows *National Helium Corp.*, supra, so that the instant case is the second case which followed *National Helium Corp.* after this court had denied certiorari.

Petitioners say that *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (C.A.-9, 1973) is, with the Tenth Circuit, in conflict with the other Circuits. However, like *Citizens to Preserve Overton Park* v. *Volpe*, supra, it involved review of agency action and whether necessary procedural requirements had been met. The sufficiency of the environmental impact statements was not even in issue. Refer to 471 F.2d 1275 at l.c. 1281, where the court said:

"Appellants do not challenge the sufficiency of the (environmental impact) statements nor the substantive decisions reached by the Secretary in regard to the projects."

The cases cited by Petitioners in support of the asserted conflict of the rule on the scope of review of an Environmental Impact Statement in the Tenth Circuit, with the rule followed in other circuits, are:

Silva v. *Lynn*, 482 F.2d 1282 (C.A.-1, 1973);

Conservation Council v. *Froehlke*, 473 F.2d 664 (C.A.-4, 1973);

Environmental Defense Fund, Inc. v. *Corps of Engineers*, 492 F.2d 1123 (C.A.-5, 1974);

Environmental Defense Fund, Inc. v. *Tennessee Valley Authority*, 371 F.S. 1004, aff'd 492 F.2d 497 (C.A.-6, 1974);

Sierra Club v. *Froehlke*, 486 F.2d 946 (C.A.-7, 1973);

Environmental Defense Fund, Inc. v. *Froehlke*, 473 F.2d 346 (C.A.-8, 1972);

Calvert Cliffs' Coordinating Committee v. *Atomic Energy Comm.*, 449 F.2d 1109 (D.C.Cir. 1971), cert. den. 404 U.S. 942 (1972).

To facilitate and ease resolution of the issue presented by the petition, the words of the opinions will be set out rather than broad, general and conclusory statements about the rulings of the courts. This should enable ready comparison with the ruling of the Tenth Circuit Court of Appeals, which Petitioners assert "rejects the great weight of authority." (Brief, p. 10).

The Court of Appeals for the First Circuit, in *Silva* v. *Lynn*, supra, said, l.c. 1283:

> "In any event, the judicial inquiries are whether the agency's findings and conclusions in the EIS are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and whether the agency followed the procedures required by law."

The Court of Appeals for the Fourth Circuit, in *Conservation Council* v. *Froehlke*, supra, had before it the question of the obligation to review the merits of a substantive agency decision to determine if it was in accord with the National Environmental Policy Act, rather than the question of the adequacy of an Environmental Impact Statement. The court said, l.c. 1283:

> "We agree with the Eighth Circuit that:
>
> '. . . . District Courts have an obligation to *review substantive agency decisions* on the merits to determine if they are in accord with NEPA.
>
> 'The review is a limited one for the purpose of determining whether the agency reached its *decision* after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors.'
>
> Environmental Defense Fund v. Froehlke, 473 F.2d 346 (No. 72-1427, 8th Cir., Dec. 14, 1972).
>
> "We think the District Court must engage in a 'substantial inquiry' to determine 'whether there has been a clear error of judgment.' Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971)."

The Fifth Circuit, in *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, supra, had before it the question of whether the United States Army Corps of Engineers had complied with the duties imposed upon it by the National Environmental Policy Act, including the adequacy of the Environmental Impact Statement. The court held that the refusal of the District Court to review the merits of the Corps' determination to proceed with the project was not reversible error since that decision had been superseded, as in the instant case, by a Congressional decision that the project should go forward, which was made after a legally sufficient environmental impact study

had been filed and debated. The court, however, did say, l.c. 1139-40:

> "We therefore hold that the broad and general provisions of Section 101 do delineate sufficiently definite standards to permit a meaningful, albeit limited, review; and that an agency's ecological decisions under NEPA are not beyond APA scrutiny."

The Sixth Circuit, in *Environmental Defense Fund, Inc.* v. *Tennessee Valley Authority*, 492 F.2d 497 (C.A.-6, 1974), does not deal with the scope of review. However, it affirms the judgment of the District Court, whose opinion contains the quotation from the opinion of the Court of Appeals for the Eighth Circuit, which is quoted above in the extract from the Fourth Circuit's opinion in *Conservation Council* v. *Froehlke*, supra.

The Seventh Circuit, in *Sierra Club* v. *Froehlke*, supra, had the "scope of review" question before it for the first time. After reviewing the authorities, it said, l.c. 953:

> "In light of these statements, we feel compelled to hold that an agency's decision should be subjected to a review on the merits to determine if it is in accord with the substantive requirements of NEPA. The review should be limited to determining whether the agency's decision is arbitrary or capricious. 'The court is not empowered to substitute its judgment for that of the agency.' Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 77 (1971)."

Petitioners cite two cases decided by the Eighth Circuit Court of Appeals and quote from the opinion in one. As Petitioners in their Brief, pp. 10-11, quote from the opinion of the Court in the earlier of the two cases, a pertinent

extract from the opinion in the later case, *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346 (C.A.-8, 1972), here follows for convenience of consideration. At l.c. 353, the court said:

> "The review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors. Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, supra.
>
> "We caution, as we did in Environmental Defense Fund, Inc. v. Crops of Engineers of the United States Army, supra, at 300, that:
>
> > '* * * Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.'
>
> "Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 48 L.Ed. 2d 136 (1971)."

The final case cited by petitioners is *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, supra, which was decided by the Court of Appeals for the District of Columbia. The court in that case had before it, not a particular decision of the agency, but rather a review of the rules promulgated by the Commission governing consideration of environmental values in

individual decisions. On the particular point under consideration the court said, l.c. 1115:

> "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse."

As is to be expected the rulings of the courts of appeal pertain to the issues brought before them for review. Since those issues were not framed identically in all of the cases cited, it is not surprising that the language employed to define the scope of review may have differed somewhat. Aside from that, however, it would be too much to expect that all of the jurists writing opinions would use the same choice of words to express themselves.

Finally, it is obvious that the Court of Appeals for the Tenth Circuit does not consider itself as being out of harmony with the other circuit courts of appeal, as one of the cases cited in the instant opinion is *National Helium Corporation* v. *Morton,* supra, which relies on *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* supra, for authority, and *Calvert Cliffs'* is one of the progenitors of other cases allegedly in conflict.

In short, it appears that there is but little difference in the scope of review in the several courts of appeal, and the slight differences in the wording of the rule are simply a matter of semantics.

Accordingly, Intervenor-Respondents ask the Court to refuse to grant a writ of certiorari.

Respectfully submitted,

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